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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

VISHWAJIT ROY, Plaintiff and Appellant, v. SISYPHIAN, LLC, et al., Defendants and Respondents.	B215115 (Los Angeles County Super. Ct. No. LC077787)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael Latin, Judge. Affirmed.

Pius Joseph, a Professional Law Corporation and Pius Joseph for Plaintiff and Appellant.

Maranga • Morgenstern, Robert A. Morgenstern, Ninos Saroukhanioff and Dennis S. Newitt for Defendant and Respondent, Sisyphian LLC.

Ford, Walker, Haggerty & Behar, William C. Haggerty, Brian J. Wagner and Maxine J. Lebowitz for Defendant and Respondent Syzygy LLC.

Vishwajit Roy appeals from the judgment entered after the court granted a motion for summary judgment in favor of Sisyphian, LLC, doing business as Xposed Gentlemen's Club (Xposed), Syzygy LLC, doing business as The Wet Spot, and Brad Barnes (collectively nightclub defendants) in this premises liability action. Roy, who was brutally assaulted when returning to his parked car on a public street near The Wet Spot, contends the trial court erred in concluding the nightclub defendants had no duty to protect him from the attack. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Attack*

The Wet Spot, a nightclub featuring exotic dancers, is located on Canoga Avenue near the intersection of Canoga and Roscoe Boulevard. The nightclub is part of a larger building structure also occupied by Xposed, a nude dancing establishment that, pursuant to state law, cannot serve alcohol. The Wet Spot and Xposed have separate entrances and share, along with other businesses in the strip mall, a parking lot.

When Roy arrived at The Wet Spot late in the evening on Saturday, June 25, 2005, the strip mall parking lot on Canoga Avenue was full. Roy parked his car on Roscoe Boulevard and walked around the corner to the entrance of The Wet Spot. A security guard at the front door checked his identification.

Inside The Wet Spot Roy began flirting with a dancer named Christina and purchased multiple drinks for her. Around midnight Christina introduced another dancer to Roy and then began kissing her friend in front of Roy, drawing the attention of other patrons in the bar. Roy told Christina he did not approve of her behavior and admonished her to "elevate her morality." Apparently offended or angered by the comments, Christina swore at Roy and walked away, joining a small group at the rear of the nightclub that included two Hispanic men and Joshua Rooney, a former employee and frequent customer at The Wet Spot. Members of the group looked at Roy and pointed at him. A security guard approached the group and spoke to them while also looking over at Roy.

Roy then left the bar to smoke a cigarette in the parking lot. He was followed outside by Christina and one of the Hispanic men. Approximately three feet from the entrance to The Wet Spot, the man, without further provocation, verbally threatened Roy and forcefully pushed him. Roy fell to ground, hitting his head on the pavement. Although a security guard was on duty inside the club, no guard was present outside the club at the time of the incident.

After this encounter Roy decided to leave. While walking to his parked car on Roscoe Boulevard, Roy passed Christina and a group of people gathered by a black truck. Roy then heard and saw Rooney and the second Hispanic man dashing toward him. As he approached his car around the corner from The Wet Spot, Roy was attacked by Rooney, who repeatedly hit and kicked Roy, inflicting serious injuries. According to Roy, Rooney claimed to be defending "Christina's honor." Injured and bleeding, Roy drove to The Wet Spot parking lot and stumbled out of his car near the nightclub entrance. He dialed the police emergency number on his cell phone and then handed his phone to the security guard who had come outside.

2. *Roy's Lawsuit and the Motion for Summary Judgment*

Roy initially filed a complaint against Xposed, Rooney and Christina to recover for his personal injuries on several theories, including negligence, assault and battery, conspiracy to commit battery and intentional infliction of emotional distress. After several amendments, the operative fourth amended complaint named Syzygy, the owner of The Wet Spot, Sisyphian, the owner of Xposed, and Barnes, the manager of both clubs, in causes of action for negligence and personal injury, alleging the nightclub defendants had unreasonably failed to protect him from an ongoing attack that began in the jointly owned parking lot and continued to the public street near his parked car. Roy also sued Rooney for negligence and assault.

The nightclub defendants moved for summary judgment, contending they owed no duty to protect Roy from the assault, which had occurred away from their premises on a public street. Sisyphian also asserted, because Roy was not a customer of Xposed the night of the attack and Xposed and The Wet Spot are separate establishments owned by

separate legal entities (although apparently with some common ownership of the limited liability corporations), it owed no duty to Roy under any circumstance.

Roy opposed the motion, asserting the failure of The Wet Spot to address the hostile situation that had developed inside the bar and the absence of a security guard to stop the initial confrontation outside its front entrance breached the nightclub's duty to protect him on the premises. Roy argued a triable issue of fact existed as to whether Rooney's attack on Roscoe Boulevard was proximately caused by this alleged breach of duty on the nightclub's premises.

3. *The Trial Court's Ruling Granting Summary Judgment*

The trial court granted the motion, concluding as a matter of law the nightclub defendants had no duty to protect Roy from an attack on a public street. The court also rejected Roy's argument that Rooney's assault was part of an ongoing attack that began just outside the nightclub, finding there was no evidence of any connection between Rooney's assault and the initial physical confrontation in the parking lot. In light of its ruling on duty, the court declined to decide whether The Wet Spot and Xposed were separate legal entities for purposes of a premises liability action based on alleged criminal conduct by a third party in the shared parking lot.

DISCUSSION

1. *Standard of Review*

A motion for summary judgment is properly granted only when "all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) We review a grant of summary judgment de novo and decide independently whether the facts not subject to triable dispute warrant judgment for the moving party as a matter of law. (*Intel Corp. v. Hamidi* (2003) 30 Cal.4th 1342, 1348.) We view the evidence in the light most favorable to the opposing party, liberally construing the opposing party's evidence and strictly scrutinizing the moving party's. (*O'Riordan v. Federal Kemper Life Assurance Co*. (2005) 36 Cal.4th 281, 284.)

Duty is a question of law decided by the courts. (*Delgado v. Trax Bar & Grill* (2005) 36 Cal.4th 224, 237-238 (*Delgado*); *Morris v. De La Torre* (2005) 36 Cal.4th 260, 264.)

2. *Governing Law: A Business Owner's Duty To Protect Its Patrons*

As a general matter, there is no duty to protect others from the criminal conduct of third parties. (*Delgado, supra,* 36 Cal.4th at p. 235; see *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425, 435.) Nonetheless, it is now well established that "business proprietors such as shopping centers, restaurants, and bars owe a duty to their patrons to maintain their premises in a reasonably safe condition, and that this duty includes an obligation to undertake 'reasonable steps to secure common areas against foreseeable criminal acts of third parties that are likely to occur in the absence of such precautionary measures.'" (*Delgado,* at p. 229; accord, *Morris v. De La Torre, supra,* 36 Cal.4th at p. 264; *Ann M. v. Pacific Plaza Shopping Center* (1993) 6 Cal.4th 666, 674 disapproved on another ground in *Reid v. Google, Inc.* (Aug. 5, 2010, S158965) __ Cal.4th __ [2010 Cal. Lexis 7544].)

This expanded duty of business owners to protect their patrons and invitees from foreseeable criminal acts is based on the "special relationship" the owner has to its customers. (See *Morris v. De La Torre, supra*, 36 Cal.4th at p. 269 ["[a] defendant may owe an affirmative duty to protect another from the conduct of third parties, or to assist another who has been attacked by third parties, if he or she has a 'special relationship' with the other person"].) "California decisions long have recognized, under the special relationship doctrine, that a proprietor who services intoxicating drinks to customers for consumption on the premises must 'exercis[e] reasonable care to protect his patrons from injury at the hands of fellow guests.'" (*Delgado, supra,* 36 Cal.4th at p. 241.) However, a business owner has no duty to protect patrons from criminal conduct that does not take place on its own premises or in areas within its control: "A defendant cannot be held liable for the defective or dangerous condition of property which it did not own, possess, or control. Where the absence of ownership, possession, or control has been

unequivocally established, summary judgment is proper." (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134.)

3. *The Nightclub Defendants Had No Duty To Protect Roy from Rooney's Attack on a Public Street*

Rooney attacked Roy on Roscoe Boulevard, a public street around the corner from The Wet Spot and Xposed and their common parking area. The nightclub defendants had no duty to protect Roy from criminal conduct that occurred on a public street over which they concededly had no actual right of control. (See *Donnell v. California Western School of Law* (1988) 200 Cal.App.3d 715, 725 [law student attacked on sidewalk while leaving defendant law school's premises; student presented no evidence law school had any right to control or manage the city-owned sidewalk; "premises liability is based on ownership, possession or control"].) As this court explained in *Rosenbaum v. Security Pacific Corp.* (1996) 43 Cal.App.4th 1084, 1091, "California cases which have considered a property owner's duty in the context of injuries occurring off the property have imposed liability only if the harm was foreseeable *and* the owner controlled the site of the injury [citation], or affirmatively created a dangerous condition on the site [citation] or if there was a functional connection between the owner's conduct and the injury suffered." (See also *Balard v. Bassman Event Security, Inc.* (1989) 210 Cal.App.3d 243 [no duty owed restaurant patron kidnapped and assaulted outside premises]; *Medina v. Hillshire Partners* (1995) 40 Cal.App.4th 477, 480-481 [landlord not liable for victim's death following attack by gang members as he walked by the apartment complex notwithstanding allegation that landlord allowed gang members to congregate in and around the complex].) None of those factors is present here.

Southland Corp. v. Superior Court (1988) 203 Cal.App.3d 656 (*Southland*), upon which Roy relies, does not state a contrary rule. Rather, after quoting *Isaacs v. Huntington Memorial Hospital, supra,* 38 Cal.3d at page 134, Division Three of this court held a landlord's special duty to protect its invitees from the conduct of third persons, with certain exceptions not relevant either to the case before it or to our case, "is limited to those cases where the plaintiff is injured on premises which are owned,

possession or *controlled* by the defendant." (*Southland*, at p. 664.) Unlike our case, however, the court in *Southland* concluded there was a triable issue of control and therefore upheld the trial court's order denying the motion for summary judgment filed by the petitioners (defendants in the proceedings below). (*Id.* at pp. 666-667.)

The plaintiff in *Southland* had been attacked by three young men in a vacant, unpaved lot adjacent to the defendants' 7-Eleven convenience store, approximately 10 feet beyond the boundary of the store. (*Southland, supra,* 203 Cal.App.3d at p. 660.) Although neither the franchisor nor franchisee defendant owned or leased the adjacent lot, the record (that is, language in the master lease) indicated they had a nonexclusive right to use a portion of the lot for the ingress and egress of their employees and customers "and apparently also had a *non-exclusive* right to use the adjacent lot for extra parking." (*Id.* at p. 661, fn. 1.) The defendants were aware many of their customers regularly parked in the adjacent lot, which had become a hangout for local juveniles. (*Id.* at p. 661.) The store manager frequently asked loitering juveniles to leave the lot and on occasion would call the police to enforce the request. (*Id.* at pp. 666-667.) Our colleagues in Division Three concluded this evidence, although not conclusively proving the defendants exercised control over the adjacent lot for purposes of premises liability, was sufficient to create a triable issue of fact on the question of control. (*Id.* at p. 667)

Roy argues that, as was true in *Southland,* The Wet Spot and Xposed did not have sufficient parking in their own lot and the nightclub defendants, therefore, necessarily knew their customers parked on Roscoe Boulevard and at least passively encouraged this practice. Accordingly, he asserts, a triable issue of fact exists as to whether they had an apparent right to control the location where Rooney attacked Roy. However, as a basis for establishing apparent control with a corresponding duty to protect off-site business invitees, there is a vast difference between a contractual right, albeit nonexclusive, to use immediately adjacent private property for parking (as well as the right to use it for employees and customers to enter and leave the store) and the mere availability of public parking on a city street around the corner from a business establishment. Moreover, nothing in the record in this case suggests any attempt to control public parking by the

nightclub defendants comparable to the 7-Eleven store manager's efforts in *Southland* to rid the adjacent lot of loitering juvenile gang members—facts that were essential to the appellate court's decision to affirm the denial of summary judgment. (See *Southland, supra,* 203 Cal.App.3d at pp. 666-667.)

Roy also notes that Rooney's attack, according to Rooney's deposition testimony, took place near a large sign advertising the location of The Wet Spot and Xposed. Roy argues the nightclub defendants must have been aware that customers would rely on the sign to find their businesses. But Roy fails to present any evidence that placement of the sign outside the shared strip mall parking lot gave the nightclub defendants any right (or even any apparent right) to control the public sidewalks or city streets near the clubs.

Roy's argument, in essence, is that knowledge that overflow customers park on neighboring city streets, without more, is sufficient to create a duty to protect those customers from a criminal attack whenever they are walking between their cars and the business establishment. If accepted, that argument would expose any successful business (a retail store during a clearance sale or a bookstore with a popular author present for a book signing) to liability for criminal conduct perpetrated against its customers whether it occurs around the corner or several blocks away. As the court observed in *Steinmetz v. Stockton City Chamber of Commerce* (1985) 169 Cal.App.3d 1142, in which the victim had been murdered on property not within the possession or control of the defendant but at a different location in the same industrial park, it is difficult to perceive how a rule of liability using such an "elastic concept of business premises" could be fashioned. (*Id.* at p. 1147.)

4. *Roy Failed To Present Evidence Establishing a Triable Issue of Fact in Support of His Theory the Attack on Roscoe Boulevard Was a Continuation of the Initial Confrontation in The Wet Spot Parking Lot*

Even if the nightclub defendants' duty to protect patrons from criminal conduct does not generally extend to customers returning to their cars parked on the nearby city streets, Roy argues Rooney's brutal attack on Roscoe Boulevard was a continuation of the earlier confrontation between Roy and one of the Hispanic men in the nightclub parking lot and the failure to intervene and stop that initial assault was a breach of the

nightclub defendants' duty that proximately caused the injuries he sustained later at the hands of Rooney. Because the nightclub defendants' presented evidence and legal argument with their moving papers that indicated Roy could not establish a breach of duty in connection with the Roscoe Boulevard attack, the burden shifted to Roy to show the existence of a triable issue of fact on this alternate theory of liability. (See *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476-477; Code Civ. Proc., § 437c, subd. (p)(2).) He failed to satisfy this burden.

First, Roy presented no evidence to support his claim that the initial confrontation in the parking lot and the subsequent beating by Rooney were part of a concerted or coordinated action by the two assailants. Rooney's purported statement that he had attacked Roy to defend "Christina's honor" is immaterial. Assuming it was reasonable to infer that Rooney and the first, unidentified Hispanic man attacked Roy for the same reason, the similarity in their motivation is not evidence of a single, ongoing or continuous course of conduct.

Second, even if the assaults were somehow coordinated and the nightclub defendants' breached a duty to stop the initial confrontation or otherwise diffuse the situation created by Roy's comments to Christina while he was on their premises, Roy presented no evidence of any causal connection between the two events—one on-site, and the second off-site and on the public streets. That is, there was no evidence that any intervention by security personnel in The Wet Spot parking lot would have deterred Rooney from attacking Roy on Roscoe Boulevard. "A plaintiff must establish, by nonspeculative evidence, some actual causal link between the plaintiff's injury and the defendant's failure to provide adequate security measures." (*Saelzler v. Advanced Group 400* (2001) 25 Cal.4th 763, 774.) Accordingly, Roy's alternate theory, like his primary argument, fails as a matter of law.

DISPOSITION

The judgment is affirmed. The nightclub defendants are to recover their costs on appeal.

PERLUSS, P. J.

We concur:

WOODS, J.

ZELON, J.